A

DATUK BANDAR KUALA LUMPUR

v.

KWONG CHOON YING

B

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[ORIGINATING SUMMONS NO: 24F-828-07-2013]
19 DECEMBER 2013

C ***LOCAL GOVERNMENT:*** *Rates - Arrears of assessment - Action by local authority - Defendant's failure to settle amount due and owing - Application for order for sale by way of public auction - Whether ss. 148 and 149 Local Government Act 1976 complied with - Whether s. 257 National Land Code applicable - Whether court exercised powers under*
D *O. 31 r. 1 Rules of Court 2012 and Courts of Judicature Act 1964 to allow plaintiff's application*

LAND LAW: *Charge - Order for sale - Arrears of assessment - Action by local authority - Defendant's failure to settle amount due and owing -*
E *Application for order for sale by way of public auction - Whether local authority proven that it was a chargee pursuant to registered charge - Whether local authority could recover unpaid rates under s. 257 National Land Code - Whether there was breach of terms of registered charge*

F The defendant had failed to settle the amount of arrears of rate or assessment ('the arrear') for the sum of RM5,322 due and owing to the plaintiff. To realise the arrears, the plaintiff had filed an application for an order for sale of the defendant's property by way of public auction. The plaintiff's application was made under the following provisions, *ie*: (i) s. 151 of the Local Government Act
G 1976 ('LGA'); (ii) s. 257 of the National Land Code ('NLC'); and (iii) O. 31 of the Rules of Court 2012 ('ROC'). The issues addressed *vide* this application, *inter alia*, were (i) whether ss. 148 and 149 of the LGA had been complied with; (ii) whether the sale of the immovable property by an order of court was necessary or
H expedient; (iii) whether there was a registered charge within the meaning of the NLC; and (iv) whether the court could exercise its powers under the Courts of Judicature Act 1964 ('CJA') to allow the plaintiff's application.

I

Held (dismissing plaintiff's application):

(1) By virtue of s. 148(1) of the LGA, the plaintiff should issue a warrant of attachment in Form F of the First Schedule and seize the movable property of the owner or occupier, who was liable to pay the arrears. Before doing that, the plaintiff would be required to serve a notice in Form E of the First Schedule to the owner of the holding by giving him 15 days from the date of the posting or delivery of the notice to pay the arrears. Under s. 148(2) of the LGA, the warrant of execution shall be executed by an officer of the local authority who shall make an inventory of the property attached. The officer shall, at the same time, give notice in Form G of the First Schedule to the person in possession of the property at the time of attachment. (paras 5-7)

(2) According to the proviso to s. 148(2) of the LGA, the plaintiff could effect the procedure for the recovery of the arrears under s. 151 of the LGA when, "in the opinion of the officer", the value of the movable property to be attached is of a lesser value than the arrears to be recovered or there is no movable property to be attached. However, before doing that, the plaintiff is required to affix a notice in Form H of the First Schedule on a conspicuous part of the holding (*Ke Ka Tong v. Datuk Bandar Kuala Lumpur*; foll). (para 8)

(3) The plaintiff had issued Forms E, F and H towards the defendant. However, there was no evidence that the plaintiff had done the following before Form H was issued, *ie*, that (i) its officers had made an inventory of the property attached; (ii) Form G was issued to the defendant; and (iii) its officer gave an opinion that the value of the movable property to be attached was of a lesser value than the arrears to be recovered or there was no movable property to be attached. The plaintiff had not complied with the requirements of ss. 148(1), (2) and 149 of the LGA. Therefore, the plaintiff was not allowed to proceed under s. 151 of the LGA to make this application for an order for sale. (paras 13 & 15)

(4) It was not just or reasonable to order the public auction of the defendant's holding, which value was far in excess of the amount of the arrears. The plaintiff had failed to prove that the application for the sale of the defendant's holding was necessary or expedient. Therefore, the court did not deem it

fit to exercise its power in this case under O. 31 r. 1 of the ROC to order a sale of such holding. Further, O. 31 r. 1 should be considered together with the provisions of substantive law regarding the matter and in this case, the provisions of the LGA in particular, ss. 148, 149 and 151. Sections 148 and 149 must be complied with in full before the plaintiff could apply to this court to exercise its powers under O. 31 r. 1. (paras 18-20)

(5) The plaintiff, being a local authority, and not a financial institution, had failed to prove, within the meaning of the NLC, that it was a chargee pursuant to a registered charge. Section 146 of the LGA does not empower the local authority to apply for an order for sale under the NLC when there is no agreement on a charge between the plaintiff and the defendant. In fact, s. 146 goes on further to prove that if the rate remains unpaid, it "shall be recoverable in the manner hereinafter prescribed", which means as prescribed in ss. 148, 149 and 151 of the LGA. Clearly, s. 146 does not provide for the local authority to recover the unpaid rate under s. 257 of the NLC when there was no evidence of breach of terms of a registered charge by the defendant as a chargor. Further, it was legally wrong for the plaintiff to rely on s. 257 when the provisions under ss. 253, 254, 255, 256 and 257 (all regarding an order for sale pursuant to the chargor's breach of the terms of the agreement for the charge) could not apply herein. (paras 26 & 30)

(6) The court's jurisdiction and power to grant an order for sale must be done in accordance with the requirements of any written law governing the matter. Where the plaintiff had failed to comply with the statutory requirements or provisions under ss. 148, 149 or 151 of the LGA, s. 257 of the NLC or O. 31 r 1 of the ROC, the court would not exercise its powers under the CJA to allow such application for an order for sale of the defendant's holding. (para 35)

Case(s) referred to:

Ke Ka Tong Sdn Bhd v. Datuk Bandar Kuala Lumpur [2008] 2 CLJ 225 CA ***(foll)***

Puspavathy Thaveethu v. Majlis Perbadanan Klang & Ors And Other Appeals [2008] 6 CLJ 626 CA ***(dist)***

Tong Hin Seong v. Yong Teik Seong [2003] 1 LNS 697 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 25(1), (2)
Local Government Act 1976, ss. 146, 148(1), 149, 151(3), 158(2)
National Land Code, ss. 253(1), 254, 255, 256(2), (3), 257(1)
Rules of Court 2012, O. 31 r. 1

For the plaintiff - Naliatul Huzaimi Ab Rasip; M/s PK Yong & Co
For the defendants - Absent

Reported by Kumitha Abd Majid

JUDGMENT

Yeoh Wee Siam J:

Enclosure 1

[1] This is the plaintiff's application for an order for sale of the defendant's property by public auction in order to realise the amount of arrear of rate or assessment ("the arrear") owed to the plaintiff by the defendant, as the local authority, under s. 151(3) of the Local Government Act 1976 ("the LGA").

Court's Decision Given On 30 October 2013 Regarding Encl. 1

[2] The plaintiff's application is dismissed with liberty to file afresh. There is no order as to costs.

Grounds For Court's Decision

[3] The plaintiff's application was made under the following legal provisions:

(1) s. 151 of the LGA;

(2) s. 257 of the National Land Code ("the NLC"); and

(3) O. 31 of the Rules of Court 2012 ("the ROC").

Section 148 And 149 Of The LGA Must Be Complied With First Before s. 151 Of The Same Act Can Be Invoked

[4] In order to understand the intention of the legislature and as to how ss. 148, 149 and 151 of the LGA should operate *vis a vis* each other, I now set out the respective provisions:

Proceedings for recovery of an arrear

148 (1) For the recovery of an arrear the local authority may issue a warrant of attachment in Form F of the First Schedule hereto and may seize by virtue thereof any movable property, belonging to the owner or occupier liable to pay the same, which is found within the local authority area and may also seize any movable property, to whomsoever belonging, which is found on the holding in respect of which the arrear is due:

Provided that no warrant of attachment shall be issued by the local authority unless it has served a notice, in Form E of the First Schedule hereto, posted or delivered to the owner or any one of the owners, if more than one, at the last known address, calling on him to pay the arrear within fifteen days of the posting or delivery.

(2) The warrant shall be executed by an officer of the local authority who shall make an inventory of the property attached thereunder, and shall at the same time give notice in Form G of the First Schedule hereto, to the person in possession of the property at the time of attachment:

Provided that where in the opinion of the officer executing the warrant the value of the movable property to be attached is of a lesser value than the arrear to be recovered or there is no movable property to be attached as in the case of a holding which is vacant or unoccupied no such inventory need be made and in such a case he shall affix a notice in Form H of the First Schedule hereto on some conspicuous part of the holding or any one of the holdings in respect of which the arrear is due to the effect that procedure for the recovery shall be instituted under section 151.

(3) Such officer may break open in the daytime any house or building for the purpose of effecting such attachment.

(4) The fee for a warrant of attachment shall be of such amount as the local authority may fix from time to time and shall be costs of the attachment;

Sale of property attached

149 (1) Unless the arrear which costs be paid within seven days from the date of the attachment the property attached or such part thereof as may be necessary shall be sold by public auction:

Provided that where the property seized is of a perishable nature or where expense of keeping it in custody will exceed its value it may be sold at once.

(2) The expenses of the maintenance of livestock and the custody of moveable property shall be costs of the attachment;

Attachment and sale of holding

151 (1) If the arrear cannot be recovered in the manner provided in section 148 it shall be lawful for the Registrar of the High Court upon application made by the local authority, or by any officer of the local authority authorized by the local authority in that behalf, to order the attachment and sale of the holding or holdings in respect of which the arrear has accrued.

(2) Such attachment and sale may be effected in the manner provided by the law relating to civil procedure for the execution of a decree by attachment and sale of immovable property.

(3) The Registrar of the High Court shall, from the proceeds of sale, provide first for the costs of attachment and sale, then for payment to the local authority of the amount of the arrear, together with interest thereon at the rate of six per centum per annum and costs, and in the event of there being any surplus remaining the Registrar shall, if he is satisfied as to the right of any person claiming such surplus, pay the amount thereof to him, and if he is not so satisfied, shall place the amount on deposit in the Treasury to be held in trust for the person who may ultimately succeed in establishing his claim thereto.

(4) The local authority may in its discretion refrain from seizing and selling, or may release from attachment, any property lawfully seizable under section 148 where such property is the property of the occupier, being a tenant, of the holding or of a person not liable to pay an arrear due in respect of such holding.

(5) Where the property is the property of a tenant-occupier, the local authority shall refrain from seizing and selling or shall release from attachment such property:

Provided that the tenant-occupier pays to the local authority the rent of such holding as it falls due until the arrear is satisfied or until the termination of his tenancy and in any such case, notwithstanding anything contained in subsection (1), such holding may be attached and sold.

(6) The amount of any rent paid by a tenant-occupier to the local authority under subsection (5) may be deducted by such tenant-occupier from the next and following payments of rent to the owner of the holding.

[5] From s. 148(1) of the LGA, it is clear that the first step that the plaintiff, as the local authority, should take in order to recover an arrear is to issue a warrant of attachment in Form F of the First Schedule to the LGA ("the First Schedule") and seize the movable property of the owner or the occupier, who is liable to pay the arrear, which is found on the holding for which the arrear is due owing to the plaintiff.

[6] Before doing that, the plaintiff is required under the proviso to s. 148(1) of the LGA to serve a notice in Form E of the First Schedule to the owner of the holding giving him 15 days from the date of the posting or delivery of the notice to pay the arrear.

[7] Under s. 148(2) of the LGA, the warrant of execution shall be executed by an officer of the local authority who "shall" make an inventory of the property attached. The officer "shall" at the same time give notice in Form G of the First Schedule to the person in possession of the property at the time of attachment.

[8] According to the proviso to s. 148(2) of the LGA, it is only when, "in the opinion of the officer", that the value of the movable property to be attached is of a lesser value than the arrear to be recovered or there is no movable property to be attached, that the plaintiff can effect the procedure for the recovery of the arrear under s. 151 of the Act ie, by application to the Registrar of the High Court for an Order of attachment and sale of the holding in respect of which the arrear has accrued or is owing. But before doing that, the plaintiff is required to affix a notice in Form H of the First Schedule on a conspicuous part of the holding.

[9] In *Ke Ka Tong Sdn Bhd v. Datuk Bandar Kuala Lumpur* [2008] 2 CLJ 225; [2008] 3 MLJ 234 the Court of Appeal at p. 230 (CLJ); p. 238 (MLJ), *inter alia*, held:

> [10] However, the opening words of s. 151 makes it imperative to find that it is the intention of the Legislature to require the local authority to first exhaust the mechanisms as provided in s. 148 for the recovery of arrears outstanding due to it. The opening words read:
>
> > If the arrear cannot be recovered in the manner provided in s. 148 it shall be lawful for the registrar of the High Court upon application made by the local authority, …

[11] In other words it is for the local authority to show that it has exhausted all the mechanisms as provided for in s. 148 including the service of Form H given under the proviso of sub-s (2) of s. 148 when making an application under s. 151.

[12] Contrary to what was contended before us we do not think s. 148 or s. 151 imposes upon the appellant or debtors of the local authority the duty to ensure that the local authority has done all that is required to be done under s. 148.

[13] Meanwhile, we are not saying that the local authority is not entitled to rely on other avenues to recover the arrears other than s. 148. That explains the use of the word 'may' in s. 148. However, if it is inclined to rely on s. 151 then the provisions of s 148 must be first observed. With respect we think the learned High Court judge erred when she ruled that s. 148 did not apply in this case.

[14] For the foregoing reason alone that we should allow the appeal.

[10] In *Puspavathy Thaveethu v. Majlis Perbadanan Klang & Ors And Other Appeals* [2008] 6 CLJ 626, the Court of Appeal dismissed the first appeal and upheld the decision of the Shah Alam High Court in allowing an order for sale of the said land pursuant to ss. 146, 148 and 151 of the LGA when the co-proprietors failed to pay the assessment rate amounting to RM21,887.

[11] In my opinion, the decision of the Court of Appeal in *Puspavathy (supra)* should be distinguished from *Ke Ka Tong (supra)*. This is because the determinative issues for consideration in *Puspavathy* are different from *Ke Ka Tong* and they are regarding the following issues:

(a) whether the non-service of the originating summons amounts to mere irregularity or a nullity;

(b) whether the 8th defendant's application is time-barred by virtue of s. 8(b) of the Limitation Act 1953; and

(c) whether s. 340 of the NLC confers an indefeasible title on the 2nd intervener (see judgment of the Court of Appeal dated 11 September 2008 para. 16 at p. 8).

[12] On the other hand, the issues in *Ke Ka Tong* are regarding the application of ss. 148 and 151 of the LGA. Thus, this court has decided that the decision in *Ke Ka Tong* should appropriately apply to this case rather than the decision in *Puspavathy*.

[13] In the present case, the plaintiff had issued Forms E, F and H. However, there is no evidence that the plaintiff had:

(a) through its officer, made an inventory of the property attached;

(b) issued Form G to the defendant;

(c) through its officer, given an opinion that the value of the movable property to be attached is of a lesser value than the arrear to be recovered or there is no movable property to be attached,

before it proceeded to issue Form H.

[14] There is also no proof that the defendant had failed to pay the arrear and costs within seven days from the date of attachment of the property and pursuant to that the plaintiff had sold the defendant's property that was attached by public auction under s. 149 of the LGA.

[15] In this case, the plaintiff had opted to proceed under s. 148 of the LGA when it issued Forms E, F and H. But it did not issue Form G. Accordingly, the court holds that the plaintiff has not fully complied with the requirements of s. 148(1) and (2), and s. 149 of the LGA. Therefore, the plaintiff is not allowed to proceed further under s. 151 of the same Act to make this application for an order for sale.

The Court Is Of The View That Pursuant To O. 31 r. 1 Of The ROC, The Sale Of Immovable Property By An Order Of The Court In This Case Does Not Appear To Be Necessary Or Expedient

[16] Order 31 r. 1 of the ROC provides as follows:

Order 31

Sales Of Immovable Property By Order Of Court

Power to order sale of immovable property (O. 31 r. 1)

1. Where in any cause or matter relating to any immovable property it appears necessary expedient for the purposes of the cause or matter that the property or any part thereof

> should be sold, the Court may order that property or part to be sold, and any party bound by the order and in possession of that property or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct.

[17] Regarding O. 31 r. 1 of the old Rules of the High Court 1980, which is in *pari materia* with O. 31 r. 1 of the new ROC, Malik Ishak J (as he then was) stated in *Tong Hin Seong v. Yong Teik Seong* [2003] 1 LNS 697; [2003] 6 MLJ 38:

> The root words would be attached to the words 'it appears necessary or expedient'. Those words must be the guiding force before the court makes an order that a particular property or part of it is to be sold. … It is also a requirement that the court may order a sale of the property, like the present case, whenever it is necessary for the purposes of the action.

[18] The court notes that the amount of arrear in the present case is small ie, RM5,322. It is not just or reasonable to order the public auction of the defendant's holding, which value is far in excess of the amount of arrear, to enable the plaintiff to recover the arrear.

[19] The plaintiff in this case has failed to prove that the application made before this court for the sale of the defendant's holding is necessary or expedient for the purpose of the Plaintiff for recovery of the arrear. Therefore, the court does not deem it fit to exercise its power in this case under O. 31 r. 1 of the ROC to order a sale of such holding.

[20] In my view, O. 31 r. 1 of the ROC should be considered together with the provisions of substantive law regarding the matter, and in this case, the provisions of the LGA in particular s. 148, s. 149 and s. 151 of the LGA. Section 148 and s. 149 of the LGA must be complied with in full by the plaintiff first before it can apply to this court to exercise its powers under O. 31 r. 1 of the ROC.

Section 257 Of The NLC Cannot Be Invoked Since It Is Not Applicable

[21] Section 257(1) of the NLC only provides for the matters to be dealt with by an Order for Sale, namely, that the requisite Form 16H shall, *inter alia*, provide for the sale to be by public auction and the particulars regarding the date of the sale and

specification of the amount due to the chargee, the fixing of the reserve price by the Registrar of the Court and the manner of paying the purchase price after a successful sale by public auction.

[22] However, the substantive provision regarding an application to the court for an Order for Sale is found in s. 256(2) and (3) of the NLC which provide:

> 256(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.
>
> (3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

[23] Section 256(2) and (3) of the NLC provide for a situation where "a chargee" applies to the Court for an Order for Sale. Section 256 and 257 of the NLC were enacted under Part 16 Chapter 3 of the NLC which deals with "Remedies of Chargees: Sale". This can be clearly seen in s. 253(1) of the NLC which provides as follows:

> **Purpose and scope of this Chapter**
>
> 253(1) The provisions of this Chapter shall have effect for the purpose of enabling any chargee to obtain the sale of the land or lease to which his charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein.

[24] In s. 253(3) of the same Chapter, the term "chargee" has been defined to include a financial institution.

[25] The term "charge" in the Interpretation section in s. 5 of the NLC means a registered charge.

[26] The plaintiff, being a local authority, and not a financial institution, failed to prove to the satisfaction of this court that it is "a chargee" pursuant to a registered charge within the meaning of the NLC. There is no proof that the defendant owed the arrear to the plaintiff under a registered charge executed by the defendant, as chargor. Clearly, there is no charge involved in the present case. The arrear owed by the defendant is merely an arrear of rate assessed by the plaintiff for the holding owned by

the defendant under the LGA. As such, it is legally wrong and rather absurd for the plaintiff to invoke and rely on s. 257 of the NLC when clearly the provisions of ss. 253, 254, 255, 256 and 257 of the NLC (all regarding an Order for Sale pursuant to the chargor's breach of the terms of the agreement for the charge) cannot apply here in the first place.

[27] Section 146 of the LGA provides as follows:

> **Rates to be first charge**
>
> 146. **All rates shall** be paid by the persons who are owners of the holdings for the time being, and **until so paid, subject to the National Land Code** [Act 56 of 1965], **be a first charge on the holdings** in respect of which they are assessed, and if not paid within the prescribed time, shall be recoverable in the manner hereinafter prescribed.

[28] I am unable to agree with the view that the arrear of the rate in this case creates a charge between the plaintiff, as chargee, and the defendant, as chargor, and pursuant to such fiction, the defendant can now invoke s. 257 of the NLC to apply for an Order for Sale.

[29] The term "charge" has not been defined in the LGA but according to the *Oxford Compact English Dictionary*, 2nd edn., the term "charge", *inter alia*, means "demand (an amount) as a price for service rendered or goods supplied".

[30] Applying the *Oxford Dictionary* meaning to s. 146 of the LGA, it means that the local authority has the right to make the first demand on the holding should the holding be ever sold by public auction pursuant to s. 257 of the NLC. However, s. 146 of the LGA does not empower the local authority to apply for an Order for Sale under the NLC when there is no agreement on a charge (which charge should subsequently be registered) between the plaintiff and the defendant. In fact, s. 146 of the LGA goes on further to provide that if the rate remains unpaid, it "shall be recoverable in the manner hereinafter prescribed", which means as prescribed in ss. 148, 149 and 151 of the LGA. Clearly, s. 146 of the LGA does not provide for the local authority to recover the unpaid rate under s. 257 of the NLC when there is no evidence of breach of the terms of a registered charge by the defendant as a chargor.

A *Section 158(2) Of The LGA Is Not Applicable*

[31] Section 158(2) of the LGA provides:

> 158(2) No proceedings under this Part for the recovery of any rate shall be quashed or set aside in any court for want of form.

B

[32] In the present case, the plaintiff's action was dismissed not for want of form, but for want of substance ie, for non-compliance with ss. 148 and 149 of the LGA before proceeding to rely on s. 151 of the same Act, and O. 31 r. 1 of the ROC. As such, C s. 158(2) of the LGA is not applicable and therefore cannot be relied upon by the plaintiff.

Section 25(1) And (2) Of The Courts Of Judicature Act 1964 ("the CJA") And Paras 3, 4, 9 And 10 Of The Schedule To The Same D *Act Can Only Be Invoked If The Plaintiff Complies With The Provisions Of The LGA, The NLC And The ROC*

[33] Section 25(1) and (2) of the CJA provide as follows:

> **Powers of the High Court**
>
> E 25(1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
>
> F (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance G with any written law or rules of court relating to the same.

[34] Paragraphs 3, 4, 9 and 10 of the Schedule to the CJA provide as follows:

> **Partition of land**
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> H 3. Power to direct a sale instead of partition in any action for partition of land; and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part thereof to be sold, and to give all necessary and consequential directions;
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> I

Sale of land

4. Power to order land to be charged or mortgaged, as the case may be, in any case in which there is jurisdiction to order a sale;

Writs of seizure and sale

9. Power to enforce judgment of the Court for the payment of money to any person or into Court by a writ, to be called a writ of seizure and sale, under which all the property, movable or immovable, of whatever description, of a judgment debtor may be seized, except property which is exempt from seizure and sale under any written law;

Other execution

10. Power to enforce a judgment of the Court in any other manner which may be prescribed by any written law or rules of court.

[35] From the above provisions of the CJA, it can be clearly seen that the court's jurisdiction and power to grant an Order for Sale must be done in accordance with the requirements of any written law governing the matter. Where the plaintiff has failed to comply with the statutory requirements or provisions of ss. 148, 149 or 151 of the LGA, s. 257 of the NLC, or O. 31 r. 1 of the ROC, the court would not exercise its powers under the CJA to allow such application for an Order for Sale of the defendant's holding.

[36] Based on the above considerations, the court dismissed the plaintiff's application with liberty to file afresh.